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In the

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho, and TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

v.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

OBJECTION OF APPELLEE TO MOTION OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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GREAT WESTERN UNITED CORPORATION, Appellee, objects to the Motion of the NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (NAIC) for Leave to File a Brief *Amicus Curiae*, which was served on February 23, 1979, on the following grounds:

(1) This case does not involve the constitutionality or enforceability of any state insurance holding company laws

which might be applicable to tender offers for control of a domestic insurance company. The target company, Sunshine Mining Company, was and is principally engaged in the mining of silver; in the manufacture, sale and installation of coated steel, aluminum and wood fences through a subsidiary; in the manufacture of piezo electric crystals and crystal filters through a division; and in the manufacture of metal cabinets and accessories for the electronics industry and as a partner in various oil and gas leases. (Appendix, p. 40) Sunshine Mining Company was not and is not engaged in the business of insurance.

(2) The Brief of NAIC presents only a single issue, *i.e.*, whether Congress, in enacting the Williams Act amendments to the Securities Exchange Act of 1934, preempted the states from regulating corporate tender offers in a different manner.

That preemption issue has already been fully and adequately presented to the Court by the Brief of Appellants. (Appellants' Brief, pp. 66-84)

That preemption doctrine is further explored in the *Amicus Curiae* Briefs submitted by the states of Utah, Massachusetts and New York (in which 14 other states have joined).

(3) The real issue in which NAIC is interested is whether the 1970 amendments to the Williams Act provisions of the Securities Exchange Act of 1934, which brought within the scope of that Act the regulation of tender offers for equity securities of insurance companies, preempts state insurance holding company laws. That issue is currently pending in the United States District Court, Eastern District of Louisiana, *Roussel v. Boren*, No. 78-2345 (E.D.La.).

The *Roussel* preemption issue involves different historical and statutory considerations than are involved in this case. For example, after *Paul v. Virginia*, 75 U.S. (8 Wall) 168 (1869), the regulation of insurance transactions was thought to rest exclusively with the states. *SEC v. National Securities, Inc.*, 393 U.S. 453, 458 (1969). In *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), however, this Court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them. Congress quickly reacted with the enactment of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, reflecting Congress' broad support of the existing and future state systems for regulating and taxing the business of insurance. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 409 (1946). Section 2(b) of the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . ."

In *SEC v. National Securities, Inc., supra*, an Arizona statute aimed at protecting the interests of those who owned stock in an insurance company was found not to come within the sweep of the McCarran-Ferguson Act, since the Arizona statute was not a state attempt to regulate the "business of insurance" as that phrase was used in the Act. It was in fact an attempt to regulate the *securities* of insurance companies, not the business of insurance itself. Accordingly, the McCarran-Ferguson Act was held to present no barrier to the application of federal securities laws. The *Roussel* court may be called upon to determine whether state insurance holding company laws regulating tender

offers for securities of insurance companies constitute state attempts to regulate the "business of insurance" rather than the securities of insurance companies and thereby fall within the sweep of the McCarran-Ferguson Act. That is not an issue before this Court in this case.

In arguing against federal preemption of state insurance holding company laws, NAIC may find some comfort in other examples of Congressional deference to state regulation of insurance companies. Section 3(a) (10) of the Securities Act of 1933 allows insurance commissioners to regulate the terms and conditions of the exchange of the securities of insurance companies under certain circumstances. 15 U.S.C. § 77c(a) (10). Section 12(g) (2) (G) of the Securities Exchange Act of 1934 exempts securities issued by insurance companies from the registration requirements of Section 12(g) if the insurance company is regulated by its state of incorporation in all three of the following areas:

> (i) It is required to and does file annual reports with a state official or agency substantially in accordance with the requirements prescribed by NAIC;
>
> (ii) It is regulated in the solicitation of proxies in accordance with the requirements prescribed by NAIC; and
>
> (iii) After July 1, 1966, the purchase and sale of securities issued by the insurance company by beneficial owners, directors or officers of the company are subject to regulations substantially in the manner provided in § 16 of the Exchange Act relating to the reporting of and trading in securities of their companies by insiders.

15 U.S.C. § 78-1(g) (2) (G). NAIC has advised the Securities and Exchange Commission that a uniform annual reporting form prescribed by the NAIC has been adopted in

every state and in the District of Columbia; the insurance agencies in every state and the District of Columbia have adopted rules and regulations to comply with the proxy solicitation requirements substantially equivalent to what the Commission would require under its rules; and that all of the states and the District of Columbia have adopted insider trading legislation affording investor protections comparable to those of § 16 of the Exchange Act. (SEC 32nd Annual Report [1966] p. 13) CCH Fed.Sec.L.Rep. ¶ 23,301.05. This case involves none of those considerations, each of which is far beyond the scope of this appeal.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the Motion of NAIC for Leave to File a Brief *Amicus Curiae* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Objection of Appellee to Motion of National Association of Insurance Commissioners for Leave to File Brief *Amicus Curiae* were mailed by depositing the same in a United States mailbox, with airmail postage prepaid, addressed to each of the following counsel of record, this 21st day of March, 1979.

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